UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MONDĒLEZ GLOBAL LLC,	Case No.	22-CA-174272
		22-CA-178370
		22-CA-178591
and		22-CA-179007
		22-CA-180206
		22-CA-180213
BAKERY, CONFECTIONARY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 719, AFL-CIO		22-CA-181423
		22-CA-183909

GENERAL COUNSEL'S REPLY BRIEF TO THE ANSWERING BRIEF OF THE EMPLOYER AND CERTIFICATE OF SERVICE

Tara Levy
Counsel for the General Counsel
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102

INTRODUCTION

This case is before the Board on Exceptions filed by both the General Counsel and Mondelēz Global LLC (the "Respondent" or the "Employer") to the January 7, 2019 Decision and Order of Administrative Law Judge Kenneth W. Chu ("ALJ") issued in this case ("ALJD," also cited herein as "D"). Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or the "Board"), Counsel for the General Counsel files this Reply Brief to the Answering Brief filed by the Employer.

Counsel for the General Counsel's Exceptions involve one factual allegation in her Complaint, that "In about April 2016, the Employer selected employees for layoff who were not the most junior employees, contrary to the Employer's policy of laying off employees by seniority." Amended Consolidated Complaint and Notice of Hearing ("CPT") GC Ex. 1 aa**,** para. 28 (b). General Counsel alleged that by this conduct, Respondent failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees (Union) in violation of Section 8(a)(1) and (5) of the Act. CPT, para. 39. While the General Counsel alleged that other conduct by the Employer violated Section 8(d), which makes it unlawful to modify a contract mid-term, it did not allege that the change in the layoff policy violated Section 8(d).

The ALJ dismissed this allegation. The dismissal was erroneous because General Counsel established a unilateral change violation by showing that the terms and conditions of employment regarding layoff by seniority changed when in about April 2016, the Employer selected employees for layoff who were not the most junior employees. Tr 82:3-18, 106:22-107:1.) In April 2016, the Employer retained second-week trainees who trained on the production floor and who were senior to employees who were laid off. D 11:13. In so doing, the

Employer changed the past practice. Tr 82:3-18, 106:22-107:1. On one occasion, a Union business agent had agreed to allow first week classroom trainees to remain in their classroom during a layoff. Tr 106:7-22. But there was no exception for second-week trainees.

The case law that dictates General Counsel's burden of proof in an 8(a)(5) unilateral change case can be found in the ALJD and was quoted in General Counsel's Exceptions Brief. See cases cited at D 7:23-29; GC Ex Brief p. 4. It is undisputed that there was a prior practice and that there was a subsequent change. General Counsel proved her case.

Nevertheless the ALJ wrote, "Since neither party could definitely point to a past practice in the manner new hires have been laid-off in past situations, it would be reasonable to look at the expired contract for guidance." D 11:19-21. This was an error because there was a definite past practice that layoffs were by seniority. Tr 82:3-18. See also Tr 106:22-107:1. There was no dispute about this history.

There was no reason to look at the second-week trainees as meriting disparate treatment in a layoff. There was a broad past practice. It did not follow that because the Union allowed one exception for first week classroom trainees, that a second exception, for second-week employees on the production floor, should be created.

The ALJ and the Employer, in its Answering Brief, are mistaken that contract interpretation was at issue in this case. There was no dispute between the parties as to the meaning of the contract. The Employer never posed a contract defense. Contrary to the Employer's Answering Brief, it is absolutely false that the Employer referenced any contract provision at the hearing. Even now, the Employer does not point to contract language supporting its right to lay off employees while less senior employees are working.

The ALJ applied a contract provision that both parties agree has no bearing on this case. He cited a portion of Article 5 stating, "Employees on the M & R Department seniority list will be laid off in reverse order of seniority." D 10:5-6 citing GC Ex 3 at Article 5, p. 8, also cited at D 11:23-24. Both parties agree that neither the employees retained nor the employees laid off were from the M & R Department. See Employer's Answering Brief "Er AB", pp. 6-7; Tr 190:14 – 191:6. The ALJ was mistaken. This wasn't a typo. This was the basis for his decision.

The ALJ relied for his interpretation of the inapplicable contract language on a non-existent agreement between the parties that first-week classroom trainees should be spared from layoff because they are not engaged in a productive activity, D 11:26-27. There was no such agreement as to the classroom trainees. The spare testimony concerning what had happened to classroom trainees during a layoff consisted of the Business Agent's recollection that a previous business agent at an indeterminate date once made an exception that had allowed classroom trainees to remain in the classroom during a layoff of an unknown length. Tr 106:19-21. The Union has never characterized the trainees as engaging in non-productive activity. The ALJ also relied on the Labor Relations Director's admittedly general testimony that new hires were on the work floor to observe production workers. Tr 1220:5-6. Her testimony did not refer to the contract and did not support any basis in the contract, much less a "sound arguable basis" for interpreting the contract by carving out an exception from the undisputed practice

This is not a case involving contract interpretation, and if it can somehow be characterized as such, no relevant contract provision was interpreted and there was insufficient evidence to support the application of a relevant contract provision.

REPLY TO THE EMPLOYER'S FACTS

The Employer's assertion in the Facts in its Answering Brief, without citation, that General Counsel presented in support of her case, ***an interpretation of the contract*** that only employees participating in their first week of training could be spared from layoff is absolutely false. See Er AB, p. 2 (emphasis added). This is a strained attempt by the Employer to set this case up as one involving contract interpretation. Notably, the Employer does not point to any contract provision, evidence or argument by General Counsel that presents such a contract interpretation.

The Employer's assertion without citation in its Answering Brief that the ALJ found that the parties agreed that trainees should be excluded from layoffs because they do not perform productive work is also absolutely false. See Er AB, p. 2. The ALJ did find something similar. He found that the parties had agreed that the premise in retaining new hires while in the *classroom* was because they were not workers engaged in a productive manner. D 11:26-28 (emphasis added). Even still, there was no evidence that the Union or the Employer had made such an agreement. No Union witness testified that trainees do not perform productive work. The Employer's witness offered her opinion, but no evidence of an agreement. This so-called agreement was the heart of the ALJ's "sound arguable basis" conclusion and it was without evidentiary basis. D 11:26-30

In addition, the fact, as mentioned by the Employer in its Answering Brief, that the Union took a grievance protesting the retention of second-week trainees during a layoff to the second step of the grievance procedure, and then withdrew the grievance, is, as the ALJ found, utterly

irrelevant. D 11:8-10. The withdrawal of a grievance does not constitute a waiver of the Union's position.

The Employer, in its Answering Brief, quibbles with Counsel for the General Counsel that she was mistaken to describe second-week trainees as "working" during the layoff because the Employer believes that their training activities were not work.

More important than semantics, is the fact there is no factual basis for exempting the second-week trainees from layoff. The ALJ applied the "sound arguable basis" analysis to an irrelevant contract clause. There was no dispute over the meaning of the contract. The Employer posed no contractual defense. The Employer did not present evidence supporting a sound arguable basis in the contract for excluding second-week trainees. The Employer made a unilateral change without justification.

REPLY TO THE EMPLOYER'S ARGUMENT

I. The Employer Has Failed to Supply Authority Supporting the Application of A "Sound Arguable Basis" Analysis Here.

Unilateral change and contract modification cases are different in terms of principle, possible defenses and remedy:

> In terms of principle, the "unilateral change" case does not require the General Counsel to show the existence of a contract provision; [the General Counsel] need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*. The allegation is a failure to bargain. In the "contract modification" case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain. A defense to the contract modification can be that the union has consented to the change. In terms of remedy, a

> remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract.
>
> When an employer defends against a midterm contract modification allegation by arguing that the contract did not prohibit the challenged action, the Board will not ordinarily find a violation if the employer's contractual interpretation has a ""sound arguable basis."
>
> *Pacific Maritime Ass'n*, 367 NLRB No. 121 (2019).

The Employer relies on cases where, unlike here, the parties had a contractual dispute. For example, in *NCR Corp.*, 271 NLRB 1212, 1213 (1984), unlike here, Section 8(d) was at issue. *Id.* A union asserted that the employer had a contractual obligation to obtain the union's consent before the transfer of bargaining unit work defined in the contract. *Id.* The employer defended on the basis of contract language which it asserted amounted to a waiver of the union's right to obtain its consent. *Id.* The Board found that the dispute was "solely one of contract interpretation," and deferred to the Employer's "sound arguable basis" for ascribing a particular meaning to his contract." *Id*.

The instant case is not about conflicting contract interpretations. Counsel for the General Counsel did not allege a mid-term modification of the contract as prohibited by Section 8(d). The Union Business Agent viewed the contract as without impact upon trainees. Tr 105:23-25. See D 10:17-18. The Employer's witnesses did not mention any contract provision at trial. The Employer did not point to contract language, or present evidence concerning negotiating history, past practice or any other means of interpreting the contract. This was not a dispute that was solely about contract interpretation. *NCR Corp.. supra*, is inapplicable.

Similarly, in *U.S. Postal Service*, 306 No. 120 (1992), enforcement denied, *NLRB v. U.S. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993), the Postal Service reduced the work hours of its employees, a matter that the Board recognized was within the scope of Section 8(d). 306 NLRB

No. 120, *supra*, slip op. at 4. The Board found that the decision was a mandatory subject of bargaining. The Employer argued that the Union waived its right to bargain on the basis of contract language between the parties. The Board rejected the waiver argument. The D.C. Circuit found that where an employer acts pursuant to a claim of right under the collective bargaining agreement, resolution of the refusal to bargain charge rests on the interpretation of the contract at issue.

The instant dispute does not involve Section 8(d). And the Employer has not acted pursuant to a claim of right under the collective bargaining agreement. There is no evidence it advised the Union of its position that the contract permitted it to keep second-week trainees on the floor. It did not raise the contract in this hearing. *U.S. Postal Service*, 306 No. 120, *supra* is inapposite

The Employer claims that the First Circuit opinion in *Bath Marine Draftsmen's Ass'n,* 345 NLRB 499 (2005), *aff'd,* 475 F.3d 14, 26 (1st Cir. 2007) applies here because this is a Section 8(a)(5) claim with a contractual defense as well as a Section 8d contract modification claim. The ALJ did not find that the Employer asserted a contractual defense. The Employer points to no contractual defense.

In *Vickers, Inc.*, 153 NLRB 561 (1965), the Board observed that the case was solely a question of contract interpretation and refrained from exercising jurisdiction where the Employer had a "sound arguable basis." The case was unlike here where the ALJ relied on an irrelevant contract provision, where the Employer asserted no contract defense and there was no contract dispute. Similarly, *Consolidated Aircraft Corporation*, 47 NLRB 694, 706, enf'd 141 F.2d 785 (9th Cir. 1944) was an 8(a)(5) case unlike here, which involved the interpretation and administration of the contract.

"Sound arguable basis "is inapplicable here where there was not a contract dispute, the ALJ cited an irrelevant section of the contract and the Employer had no contract defense,

II**. The ALJ Did Not Rely on Past Practice in Interpreting Any Provision of the Contract.**

The ALJ explicitly did not rely on a past practice. D 11:19-21. He only relied on a non-existent agreement between the parties that the rationale for retaining first week trainees during a layoff was because they were not workers engaged in a productive manner. No evidence supports this finding. In addition, as stated above, the withdrawal of a grievance concerning second-week trainees is as stated, irrelevant. The ALJ did not rely on that either. D 11:8-10. The Employer's asserted rationale for the ALJ's decision is unsupported.

CONCLUSION

Counsel for the General Counsel did not allege a contract violation, and the Employer alleged no contract defense. She did not allege a violation that involves the interpretation of contract language, although that is the basis of the Employer's Answering Brief. In the absence of a contractual dispute, "sound arguable basis" is inapposite. General Counsel proved her case by proving a unilateral change. The ALJ's conclusion dismissing this allegation should be reversed.

Respectfully submitted,

_s/Tara Levy_____

Tara Levy, Counsel for the General Counsel

CERTIFICATE OF SERVICE

The undersigned certifies that on May 17, 2019, Counsel for the General Counsel's Reply Brief to the Employer's Answering Brief was e-filed and served via e-mail upon:

Charging Party Counsel:
Joshua B Shiffrin, Esq.
Bredhoff & Kaiser PLLC
805 15th St NW Ste 1000
Washington, DC 20005-2286
Email: jshiffrin@bredhoff.com

Employer Counsel:
Daniel D. Schudroff Esq.
Jackson Lewis LLP
666 Third Avenue, 29th Floor
New York, NY 10017
Email: schudroffd@jacksonlewis.com

Executive Secretary:
Roxanne L. Rothschild, Esq., Executive Sec.
National Labor Relations Board
Office of the Executive Secretary
1015 Half Street SE
Washington, D.C. 20570-0001
Email: Roxanne.Rothschild@nlrb.gov

Philip B. Rosen Esq., Attorney at Law
Jackson Lewis P.C.
666 Third Avenue 29th Floor
New York, NY 10017
Email: rosenp@jacksonlewis.com

/s/ Tara Levy
Tara Levy
Counsel for the General Counsel